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COVENANTS FOR TITLE RUNNING WITH THE LAND.

COVENANTS which ran with the land were of early origin, and many of them were in common use, in leases and other contracts respecting lands, long before the introduction of the modern "Covenants for Title." See *Spencer's Case*, 5 Coke's Rep. 16 a.

When, therefore, covenants were contrived as securities for the title to land, having all the requisites for running with the land, they naturally became subject to existing rules for the regulation of other covenants so far as these were applicable to them. This fact serves to explain the frequent reference, in the following discussion, to adjudications on such other covenants for illustrations and authority; but this will be avoided beyond what is strictly auxiliary to our purpose.

Much confusion prevails in the branch of law under consideration, and indeed throughout the whole subject of "Covenants for Title." There appear to be three principal causes for this confusion.

First. The "Covenants for Title" are an artificial system, of a flexible nature, which has been left to judicial skill to shape by legal principles and needful rules, to the purpose for which they

are designed. Many rules, which have been adopted because recommended by the exigencies of particular cases, have afterwards been found to lead to unforeseen and most undesirable results, thus giving occasion for numerous retractions and qualifications.

Secondly. Narrow views contained in certain early cases have too much escaped deserved criticism, and have unduly influenced subsequent decisions.

Thirdly. There has been, in many instances, a strange misconception of the effect of previous decisions, and a confounding of cases, which, however they may superficially resemble each other, are, in fact, radically different.

Much progress has recently been made towards removing these evils. Both the English and American Courts have not scrupled to reject old authorities in favor of more liberal views when necessary; and a considerable approach has been made towards establishing this branch of the law on a proper basis. It will be our aim to give an intelligible and accurate statement of the existing law, in a manner that shall also present the changes and progress in it, adding such observations and criticisms as seem to be appropriate.

The following plan, though to some extent arbitrary, will assist the execution of the work:—

I. OF THE PRINCIPLES WHICH REGULATE COVENANTS FOR TITLE IN RUNNING WITH THE LAND.

1. Of what is *meant by "running with the land."*

2. *With what* covenants for title may run.

3. To what extent the doctrine of running with the land contravenes the common law rule against the *assignment of choses in action.*

4. How far *running with the land* renders covenants for title *"real covenants."*

5. *From what* the ability of covenants for title to run with the land is *derived.*

(*a*) Of the *words* of the covenants.

(*b*) Of the *nature* of the covenants.

First. The *subject-matter* of the covenants.

Second. The *relation* of the covenanting parties to *each other*, and to *that which* the covenants concern.

II. OF THE PRACTICAL RULES WHICH REGULATE COVENANTS FOR TITLE IN RUNNING WITH THE LAND.

1. What estate is requisite to enable covenants for title to run with the land.

(*a*) The *transmission of antecedent covenants.*

(*b*) The *creation of new covenants.*

(*c*) Of trust *estates* and mortgages.

2. Of the rights and remedies of the respective parties upon breach of covenants for title running with the land.

3. Of the *division* of the *remedy* on covenants for title which run with the land.

4. Of the release of the covenants for title which run with the land, and the effects thereof.

5. Of *equities* existing between the original covenanting parties, and the effects thereof.

III. WHICH OF THE COVENANTS FOR TITLE RUN WITH THE LAND.

I. Of the principles which regulate covenants for title in running with the land.

Under this head are included some topics which might, with propriety, be classed in the subsequent divisions, but which seem essential to a complete view of the fundamental principles of the subject.

1. What is meant by "running with the land." The phrase "running with the land," as descriptive of covenants in general, is ambiguous, denoting either that the covenantor confers a benefit upon the estate of the covenantee, or imposes a burden upon that of the covenantor. Note to *Spencer's Case*, Smith's Lead. Cas. Only the former meaning applies to covenants for title; and when Chancellor KENT, speaking of these, 4 Kent 470, says, "they do not run with the land, but affect only the covenants, &c.;" the context makes it obvious that he has in mind only the latter signification.

This phrase conveniently and forcibly indicates the intimate

connection of certain covenants with estates in land, and their peculiarity in passing as incidents upon the transfer of such estates. Other expressions are sometimes used for the same purpose; for example, "inherent in the land:" Co. Litt. 384; Platt on Covs. 60, 61; "knit to the estate in the land:" Preston's Abstracts, *Covenants;* "entwined about the estate:" 4 Hawks's Reports 833. It is needless to comment upon the numerous definitions of the covenants in question. The fundamental idea of them all is a peculiar assignability, or "negotiability." 17 Wend. 136, 148.

The following is thought to be accurate, and is suited to the range of the proposed discussion:—

Covenants for title run with the land when, being either expressed or implied by words of grant (Rawle on Covs. 533), in a conveyance of land, they are of such a nature that they become valuable incidents to the ownership of the estate, and until in some way arrested, pass with it through any series of transfers, whether by act of the parties or of law, so that the owner for the time being is entitled to claim in his own name from the original covenantor all the benefits and securities arising out of them.

2. With what may covenants for title run? Mr. Hare has strongly controverted (Note to *Spencer's Case,*) the case of *Mitchell* vs. *Warner,* 5 Conn. 497, as deciding that a covenant of warranty did not embrace water resting on the land. We think an examination of the case will show that the decision is only to the effect that a right of entering for the purpose of drawing off water is not an eviction from the land, though the Court considered it an incumbrance. Doubtless, as Mr. Hare maintains, the better doctrine is that of *Bally* vs. *Wells,* 3 Wilson 26, that covenants for title may run even with incorporeal hereditaments; and it may be said generally that they will run with whatever may properly be secured by them.

3. To what extent the doctrine of running with the land contravenes the common law rule against the assignment of *choses in action.* The law of covenants running with the land is commonly said to be an exception to the common law rule, which forbids the assignment of rights of action. Rawle on Covs. 338; Note to *Spen-*

cer's Case, Smith's L. C.; 4 Kent 525; 1 Dev. & Bat. 94; 3 Wilson 26. This view, though to a certain extent correct, is subject to some limitations, as is evident from the fact that in innumerable cases it is held that, when the covenants are once broken they no longer run with the land, for the sole reason that they have BECOME *choses in action*, and therefore incapable of assignment. Without any extended discussion, we lay down the qualifications which seem necessary, and which, if observed, will prevent confusion on this subject.

(*a*) The running of covenants with the land differs from an ordinary assignment of a chose in action, in the fact that the covenants are not recognised, as *per se* the subjects of the assignment, only the land is properly considered as assigned, and the covenants pass with it, as if *ex necessitate* as incidents.

(*b*) When by breach the covenants have become strictly *choses* in action, they are subject to the ordinary rule, and no longer pass even as incidents upon assignment of the land.

4. How far running with the land renders covenants for title "real covenants."

The words "real" and "personal" are often used to describe covenants for title in a way calculated to produce confused and erroneous impressions. 9 Rich. Law Rep. 374. Instances abound in which these covenants are all called "personal;" 4 Kent 470 *et seq.*; 1 Sumner 263; 36 Me. 170, 2 Vt. 327; while in other equally numerous instances some or all of them are designated as "real." 5 Blackf. Rep. 232; 4 Johns. 120; 1 M. & S. 355; 4 Id. 53.

The true distinctions are readily explained. A "*real covenant*" is ordinarily defined as one which has for its object something annexed to, or inherent in, or connected with land or other real property. Co. Litt. 384; Platt on Covs. 60, 61; 2 Bl. Com. 304. Such covenants usually run with the land, and only such; whence it is said that "the essential difference between a real and personal covenant is, that a real covenant runs with the land." 2 Green. Evid. 240. Therefore, when it is desired to distinguish those covenants for title which run with the land from others which do not, the former are called "real" and the latter "personal" covenants.

But the old warranty for which the covenants for title were substituted, was in a wholly different sense a "real" covenant. Thus Lord COKE says: "There is a diversity between a warranty which is a covenant real, which bindeth the party to yield lands and tenements in recompense, and a covenant annexed to the land, which is to yield damages." Co. Litt. 384 b.

The remedy on covenants for title is exclusively a money compensation; accordingly when it is intended to contrast them in this respect with the ancient warranty, they are all called "personal" covenants. 4 Kent 470; 4 Hawks 310; 4 Leigh 132; 36 Me. 170.

Perhaps it is as well to say that those covenants for title which run with the land are "*of the nature*" of real covenants. 3 Zabr. 260; 1 Pike 313; 23 Missouri 155; 4 Kent 524.

5. From what is the ability of covenants for title to run with the land derived?

(*a*) Of the *words* of the *covenants*.

In covenants for title as commonly framed, the covenantor engages by express words to be bound not only to the immediate covenantee, but also to his "heirs, assigns, &c." It is at least questionable whether these words, descriptive of descendants and future owners, affect at all the ability of the covenants to run with the land. Co. Litt. 385. It is not the mere consent of the parties to a covenant that creates this ability. Still high judicial authority has attached great weight for this purpose to the terms of the covenants. In *Greenly* vs. *Wilcox*, 2 Johns. 1, 6, LIVINGSTON, J., dissenting from the conclusion of the majority of the Court that the covenant for seisin cannot run with the land, says: "But this is not the ground on which I rest it; it is that of the contract itself, by the words of which all the covenants passed to every grantee, *ad infinitum*." Language of like import may be found elsewhere in the reports. If the position of the learned Judge could be maintained, it would afford a short and easy solution of the perplexing question he was then considering. But authority and numerous technical objections are conclusive against a full acceptance of this doctrine; it may, however, to a limited extent,

be admitted, for although the words cannot of themselves impart the capacity to run with the land, they may still help to overcome technical scruples. With this view we shall again allude to this subject. It may be asked why, if the words "heirs, assigns, &c.," are inoperative, they were ever introduced into the covenants.

It has already been remarked that covenants which ran with the land were in use long before the modern covenants for title. In some of them it was unnecessary to mention assignees (1st Resolution in *Spencer's Case*); in others the covenants extended to assignees only when named. 2d Res. Id. The old warranty bound the heir only when named. Touchstone 178; Cro. Eliz. 553. Commonly for greater security, heirs, assignees, &c., were mentioned even when they might as well be omitted. And the covenants for title, which were to a great extent modelled after old forms, naturally borrowed this feature, especially as at first their true character was imperfectly understood.

(*b*) Of the *nature* of the covenants.

It is well settled that covenants for title derive their capacity for running with the land, chiefly, if not exclusively, from the *nature of the covenants.* Thus if a covenant will not run with the land, an express covenant with a person's assigns will be of no effect as regards them; covenants will always be construed according to their nature, and not according to the words in which they are framed. 6 Bythewood's Conveyancing 258, notes. Also, although the vendor covenants with the purchaser, his heirs and assigns, yet the assignee of the land will not be entitled to the benefit of the covenant unless it runs with the land under the general rule of law. 2 Sug. Vendors 372. To the same effect are numerous authorities. Clayton 60; Palmer 558; 1 Brod. & Bing. 238.

This branch of our subject involves the consideration,—

First. Of the subject-matter of covenants for title.

Secondly. Of the relation of the covenanting parties to each other, and to that which the covenants concern.

First. Of the subject-matter of covenants for title.—It follows from what has been said that covenants which run with the land

do so only as incidents to it. To this end the subject-matter of such covenants must be something which intimately concerns the land.

Originally, it was some privilege or duty, some right or obligation to be enjoyed or performed, on or about the land; and many subtle distinctions were made between those covenants which directly affected the land and ran with it, and others which only remotely affected the land and did not run with it. See *Spencer's Case*, Smith's Leading Cases. These distinctions are of no consequence to our present inquiries. The subject-matter of covenants for title is, as their name imports, the title to an estate in lands, that on which the continued possession and enjoyment of the land depend. In this respect covenants for title pre-eminently enjoy favorable qualifications for running with the land, since nothing can more closely concern the land or affect its value than the title by which the ownership is supported. No elaborate argument is needed to show the propriety of making this capacity an element of covenants for title to real property. Mere possession of land is not to the same extent as that of chattels, reliable evidence of ownership; while it results from the different natures of real and personal property, that a paramount right to the former is generally much more remote and less readily ascertained.

Besides, land being fixed and permanent, there is little or no difficulty in identifying that to which the covenants belong. There are two fundamental ideas in the rule in question—the moral obligation of a party who sells land to secure the purchaser against loss from any infirmity of the title (13 Iredell's Law Reps. 196); and the necessity that the party exposed to injury from such infirmity, and consequently most interested in this security, should control the means for making it available.

The spirit of the rule, so far as concerns the subject-matter of the covenants for title, is well expressed by saying that they must be beneficial to the owner, as owner, and to no other person (BEST, J., in 5 B. & A. 10), in order to run with the land.

Secondly. The relation of the covenanting parties to each other, and to that which the covenants concern.

Under this head we include

1. *Privity of Estate.* 2. *Identity of Estate.*

1. *Privity of Estate.*—The following topic must be kept distinct from one shortly to be considered, namely, what amount of estate must pass to support the covenants, when the covenantee's only title is derived from the covenantor. It is conceded that in order for covenants in general to run with the land there must exist a *privity of estate* between the parties. 3 Wilson 29; 3 T. R. 402; 2 East 380; 17 Wend. 136. But eminent legal writers have thought this not to be requisite in covenants for title; nor, indeed, in any covenants intended to benefit the estate of the covenantee. Hare's Note to *Spencer's Case;* Rawle on Covs. 335; 2 Lomax's Dig. 260; 3d Real Prop; Rep. of English Commissioners. This opinion has been founded almost exclusively upon the authority of an ancient case, known as the *Prior's Case*, 42d Ed. 3, 3, cited by Lord COKE. In controverting this view, Sir EDWARD SUGDEN, now Lord ST. LEONARDS (Sug. on Vend. and Pur. 472), has subjected the *Prior's Case* to a most searching criticism, which results in its complete overthrow as authority on this question, showing that the portions of it particularly relied on were not judicial resolutions, but an addition by the reporter; that the case does not contain the doctrine usually extracted from it, and that it has received no confirmation, but the contrary, from subsequent adjudications.

It may be safely laid down, that if the doctrine that the covenants for title will run with the land, even when entered into by a stranger to the land, has no better foundation than the authority of this case, it cannot be sustained; and it would seem to be the better opinion, that in order for a *covenantor's* covenants to run with the land, he must also be a *grantor* of the land which they affect. No modern case decides that a stranger's covenants may run with the land; but in a *dictum* of MONCURE, J., in the recent case of *Dickinson* vs. *Hoomes' Administrator*, 8 Grattan 406, this doctrine is broadly enunciated. The dictum is based, however, on the *Prior's Case*, and authors who have followed it. It is then

said that a purchaser of land who suspects an infirmity of title, and doubts the responsibitity of the vendor, may fortify the title by covenants of the grantor's friends, or other interested parties, and these covenants will run with the land to future assignees. This notion is possibly correct, and if so, highly important, but is not, we apprehend, in accordance with the common understanding among the members of the legal profession. 7 Jarman's Bythewood 572. The introduction of such covenants into conveyances would be a novelty, and probably of doubtful expediency. At least it would not be prudent to rely on such covenants, until further adjudications have more fully determined their value. This question is of much importance with reference to covenants to *produce title-deeds;* and there seem to be strong reasons why an exception should be made with respect to such covenants. It would be foreign to our purpose to dwell upon them here. The matter of covenants to produce title-deeds is ably discussed in the "London Law Magazine," vol. 10, p. 342, *et seq.*

2. *Identity of Estate.*—The foregoing observations relate to the elements necessary for the creation of covenants for title capable of running with the land. But in order that, after being created, they may continue to run with the land, it is necessary that assignees obtain the identical estate to which the covenants have been annexed. Questions on this point formerly arose in a certain class of cases, where land was conveyed to such uses as the purchaser should appoint, and the appointee was held not to take the identical estate that the first grantor conveyed, although he obtained the same land. *Roach* vs. *Wedhan*, 6 East 289. These cases are no longer of consequence. Sug. Vend. and Purchasers 368. But we think this principle applies admirably to solve the difficulties of another class of cases, which have been greatly misconceived. This principle is therefore barely suggested here, and will be developed and illustrated in the following division of the subject:—

II. Of the *Practical Rules*, which regulate covenants for title in running with the land.

1. What estate is necessary to enable the covenants to run with

the land.—As has been shown, covenants which run with the land presuppose some estate in land to which they are incident. Actual livery of seisin was held in all cases to furnish a sufficient substratum to uphold such covenants.

A doctrine has received some judicial recommendation, that in modern conveyances, which take effect mainly by the Statute of Uses, without the formal livery of seisin, unless the grantor has some *legal* estate in the land his covenants will not run with the land. Such a doctrine would manifestly defeat the chief purpose of the covenants, making them serviceable to repair a partial infirmity, but worthless to remedy a total defect. Able writers (Hare's Note on *Spencer's Case;* Rawle on Covenants 383) have zealously controverted this doctrine, and, as it seems to us, have largely overestimated the supposed authority on which it rests. More recent decisions have effectually guarded against its mischiefs. The importance of this topic demands an examination, which can most easily be made by a condensed review of some of the leading cases, accompanied by such observations as may be suggested by them. False impressions on this topic have grown out of a failure to recognise certain well-founded distinctions. Even Mr. Rawle, usually so perspicuous, has made these by no means sufficiently prominent. A fundamental distinction is to be drawn between *creating* covenants able to run with the land and *transmitting* those having this capacity, and already existing; for a man may be so related to land as to be able, in conveying it, to initiate a new series of covenants, when he does not transmit antecedent covenants in the chain of title. The cases which we shall examine will illustrate this proposition, and will also exemplify the following classification:—

(*a*) The *Transmission* of *Covenants.*

1. Cases where the party claiming the benefit of the covenants had acquired only an equitable or incomplete right to the estate to which they belong.

2. Cases where the original covenantor has attempted to convey an estate for a longer time than he rightfully could do, and the estate *actually conveyed* has expired before assignment to the party claiming under the covenants.

3. Like cases, when the actual estate terminated after the assignment.

4. Cases where the assignor was, at the time of the assignment, incapacitated, either by his own act or act of law, to transfer the estate to *which* the covenants belonged.

(*b*) The *Creation* of *Covenants.*

1. Cases where the grantor was *not* in possession claiming title.

2. Cases where the grantor *was* in possession claiming title.

(*a*) Transmission of Covenants.

We give the dates of the principal cases, to render the history of the law more obvious. In *Beardsley* vs. *Knight* (1832), 4 Vermont 471, a grantee who has purchased land with warranty, attempted to convey it to the plaintiff, by a deed which by the absence of a seal was void. The plaintiff having remained in possession seventeen years, was finally evicted under a claim paramount to that of the *first grantor*, against whom he brought this action, as assignee of the land and covenants; but was not permitted to maintain it.

Mr. Hare (Notes to *Spencer's Case*, *Sm. L. C.*) has criticised this case as deciding that the covenants pass only when the land is conveyed by deed. Perhaps some of the language of the Court may justify this comment: the decision itself does not. It must be observed that the estate to which the covenants were incident did not pass by the invalid instrument, but still remained in the proposed grantor. The plaintiff was indeed acquiring a new title by occupation, which was adverse to that on which the covenants were engrafted, and which, when it became complete by lapse of time, would extinguish the prior estate, *together with the covenants;* and "it would be strange," as the Court remarked, "if rights thus acquired could sustain an action on the covenants in a deed farther back in the chain of title."

Mr. Hare, overlooking the distinction between a grantor's creating new covenants and transmitting existing ones, asserts that this decision is contrary to that in *Beddoe's Executor* vs. *Wadsworth*, 21 Wend. 121. This case will be noticed in its proper place; we will here only remark, that, if in *Beardsley* vs. *Knight* the con-

veyance to the plaintiff had been under seal, the plaintiff would have recovered on the covenants of the *original covenantor*, although the latter had no *legal estate* at the time of the conveyance to the plaintiff's grantor, which is the doctrine of *Beddoes' Executor* vs. *Wadsworth*.

The same principle is admirably illustrated by a recent case in Missouri. In *VanCourt* vs. *Moore* (1857), 26 Missouri, A. has conveyed land to B. with warranty; B. conveyed to C., and C. *bargained* to convey to D., who accordingly took possession, but was evicted by a title paramount to that of A. After the eviction, D. obtained a decree against C. for a conveyance which was made; but D. was not permitted to recover on A.'s covenants, because, *before* the eviction, D. had only an equitable right in the estate, bearing the covenants which still remained in C.; and *after* the eviction C. had no estate on which the covenants could attach, and the conveyance was therefore a nullity. Before the decree, C. had recovered damages against A. on the covenants; and the Court says that if the decree *had* been obtained before this suit by C., it would have been made relating back to before eviction, and thus enabled D. to sue on the covenants. So, undoubtedly, in *Beardsley* vs. *Knight;* if the plaintiff had obtained a decree for a conveyance before eviction, or one relating back, after eviction, he could have maintained an action on the covenants. But, in both these cases, it is perceived, that there is missing a link to connect the titles of the plaintiffs with the estate to which the covenants belonged.

In *Andrew* vs. *Pearce* (1805), 1 Com. Bench 402, a tenant in tail male leased to A. for ninety-nine years, with a covenant for quiet enjoyment. A. assigned to B., and B. to C. But, previous to the assignment, the tenant in tail died, and, of course, the lease became void. It was held, that C. could not recover on the covenants against the personal representative of the lessor. The ground of the decision is, that the subject of the attempted assignment was the lease itself, whereas that no longer existed, the assignor having merely a personal right of action on the covenants contained in it. In *Williams* vs. *Burrill* (1845), 4 B. & P. 162, all

the material facts are identical with those in *Andrew* vs. *Pearce*, except that the assignment was before the lease became void; and as this fact removed the difficulties in this case, the assignee maintained his action. These decisions are entirely satisfactory on the *grounds* upon which they were decided. They suggest, however, a question of considerable nicety, and much practical importance. Stated generally, it is this: If a party undertakes to convey land with covenants, for a longer period than he can rightfully do, how long do his covenants run with the land to assignees; whether only until the estate which could *rightfully* be conveyed expires, or until an *actual eviction* from the estate *purported* to be conveyed by the party having the paramount right. In the above cases, the death of the tenant caused an immediate breach of the covenants, and the occupant was thenceforth only a tenant at sufferance. COWEN, J., 21 Wend. 120. And doubtless, in all cases, where the party in possession when the rightful estate terminates, remains in possession, acknowledging the paramount title, this constitutes such an eviction as will arrest the covenants from passing upon any subsequent assignment. But, so long as the party continues in possession, claiming the right solely by virtue of the estate purported to be conveyed, it would seem to be equitable, and in accordance with principle, to allow an assignment at any time before eviction, to transfer the antecedent covenants. This question is of high importance, in cases where life tenants undertake to convey the land in fee. In *Lewis* vs. *Cook* (1851), 13 Iredell 196, A. and his wife joined in a deed to B. of the wife's land, which, from informality in the separate examination of the wife, conveyed only the life interest of the husband. B. conveyed to C., and C. attempted to convey to D., expressly assigning the covenants. But, before the deed to D. was executed, the land was attached as the property of C. by his creditors, and afterwards sold by the sheriff to E., who remained in possession until A. died, when he was evicted by the wife's heirs, and thereupon sued A.'s personal representatives on the covenants, and obtained judgment. Here E. purchased before A.'s death, and the consequent termination of the life estate, which alone E. in fact obtained by his purchase;

but, if he had purchased after A.'s death, ignorant of all the facts, it would be very severe to hold that he could not have the benefit of the covenants. See, also, dissenting opinion of PEARSON, J., 13 Iredell 408, 3 Met. 81. This case also affords a perfect illustration of that class of cases when the grantor has become incapacitated to convey the estate to which the covenants are attached. For, although C. ostensibly, while in possession, deeded the land to D., expressly assigning the covenants, it was held that D. neither obtained any right to the land, nor to the covenants, as the attachment intercepted alike the power to convey the former, and to assign the latter.

(*b*) *The creation of covenants*—or what estate must a grantor convey to enable *his own covenants* to run with the land?—The old case of *Noke* vs. *Awder*, Croke's Eliz. 436, appears to have been the origin of the doctrine that a *legal estate* must pass in order that the covenants in a conveyance may run with the land. The decision was evidently the result of too ready an acquiescence in an ingenious but unsound argument of Lord COKE. For as the case was about to be adjudged for the plaintiff, he proposed this dilemma—that in order to recover, the plaintiff must prove eviction by a *lawful, paramount* title; but by showing this he would prove that no estate (except by estoppel) passed by the lease, and therefore the assignee could not take the benefit of the covenants. It will be observed that even this case does not decide that the *whole estate purported* to be conveyed must pass; but still *some legal estate.* This case has received severe criticism from Mr. Hare (note to *Spencer's Case*), Mr. Rawle (Rawle on Covs. 383, et seq.), and other legal writers, who have entertained great apprehensions of the disastrous results consequent upon an application of this doctrine to the law of covenants for title. We shall not repeat the criticisms, or attempt to add to them, since this is no longer necessary. After a doubtful recognition in one series of cases (6 M. & W. 656; 2 Bing. N. C. 411), and a virtual repudiation in others (2 Ld. Raymond 1550; 11 Mow. 337), it may be considered as completely overruled by the very recent case of *Cuthbertson* vs. *Irving*, 4 Hurl. & Nor. 741, decided in 1859 in the Exchequer

Chamber. After a review of the former cases, the comments of Mr. Hare on *Noke* vs. *Awder* are cited with approval, it is said that the decision was uncalled for; and the Court then proceeds to determine the case (which concerned a lease), in entire disregard of *Noke* vs. *Awder*, on a new ground, which the Court says "tends to maintain right and justice, and the enforcement of the contracts which men make with each other." *Noke* vs. *Awder* has been much less extensively received as law in this country than has been generally supposed. In *Nesbit* vs. *Montgomery*, 1 Taylor (N. Car.) 82 (1800), the Court professes to recognise *Noke* vs. *Awder* fully; but the decision does not go to that extent, for here the deed of the covenantor showed upon *the face of it* that he neither *had* nor *claimed* to have any interest in the land which he undertook to convey, and the Court lays *much stress* on this fact.

In *Martin* vs. *Gordon*, 24 Geo. 533 (1858), though we cannot see that the question was *necessarily* involved in the case, *Noke* vs. *Awder* is approved as good law, and the Court remarks that, "although the contrary has been held in Massachusetts, New York, and some other States, the Courts in so doing have seemed to make the law yield to the case, rather than the case to the law." We cannot discover that anywhere else, except, perhaps, in a few vague dicta, has *Noke* vs. *Awder* been acknowledged to be law *in this* country.

Although it would be entirely destructive of the chief value of covenants for title to hold that, in order for them to run with the land, the covenantor must have and *transfer* an *actual legal interest* in the land, it would on the other hand be neither expedient nor consistent with principle to allow this capacity to covenants, entered into upon a merely nominal conveyance of the land to some third party, to which the grantor made no pretence of ownership, and of which he has no possession.

The American Courts have quite uniformly, so far as the question has arisen, settled down upon what seems to be a very safe and salutary rule; requiring, in order that covenants for title run with the land, that the grantor shall be in possession *of the land* conveyed, claiming title, and shall transfer the possession to the

covenantee. Although the rule is commonly regarded as of later origin, it was, in fact, the ground of the decision in *Randolph* vs. *Kinney*, 3 Rand. 394 (1825), which case has, very improperly, sometimes been classed with *Noke* vs. *Awder*. There the assignee of the grantee was not allowed to recover on the grantor's covenants, distinctly for the reason that the grantor did not have, at the time of the conveyance, and did not *transfer*, either a *legal title* or an *actual possession*.

The rule was first distinctly enunciated in *Beddoes' Executor* vs. *Wadsworth*, 21 Wend. 120 (1839), where, after a most thorough discussion and mature deliberation, it was determined that when a grantor places his grantee in full possession of the premises, under claim of title, although the grantor had no legal estate, yet his covenants will enure to the benefit of the grantee's assignees. The Court laid much stress on the fact that possession was such a seisin or inchoate ownership as would in time ripen into a perfect title.

The question came up more recently in Virginia in *Dickinson* vs. *Hoome's Administrator*, 8 Grattan 406 (1852), and after very elaborate argument it was held that "reason and authority unite in showing that whenever the deed passes the possession, the covenant of warranty is effectual and runs with the land." *Randolph* vs. *Kinney* was regarded as consistent with this view.

The same doctrine has been enforced in several other cases in different jurisdictions. 2 Rawle 300; 6 Basle 165; 23 Missouri 179. In *Dickinson* vs. *Desire*, 23 Missouri 164 (1856), when the rule was fully adapted, the Courts overlooked one fact which it is quite important to remember, namely, that a seisin or possession may be sufficient to PASS COVENANTS, which is at the same time entirely inadequate to SATISFY a COVENANT for SEISIN. Rawle on Covs. 23, notes.

Perhaps the best practical illustration of the rule in question is found in the two cases of *Slater* vs. *Rawson*, 1 Met. 450; 6 Id. 439 (1840 and 1843). At the first trial it appeared that the defendant, the covenantor, had, at the time of the conveyance, neither any legal interest nor *actual* seisin in the land; accordingly

judgment was rendered *against* the plaintiff, the grantee's assignee, who sued on the covenants. But it being proved, at a second trial, that the defendant's father and the defendant himself had performed various acts of ownership on the land, under claim of title, this was adjudged sufficient to carry the defendant's covenants to the purchaser's assignee, even though the defendant's possession was purely tortious. In the application of this rule the result of the cases is, that the covenantor must have such complete and exclusive possession as might ripen into an indefeasible title.

(*c*) Of Trust Estates, Mortgages, &c.

The foregoing principles have an important bearing on the laws of trust estates, mortgages, &c. It may now be safely laid down that both *cestui que trusts* of land and their assignees are entitled to the benefit of all covenants made by those through or from whom the trust estate has been derived for securing the title to such land.

The more modern construction of mortgages which prevails to a considerable extent in this country is, that although the mortgage is *technically* a conveyance of the legal estate, still, for most *practical purposes*, except so far as is necessary to protect the rights of the mortgagee, the mortgagor is treated as holding the legal estate. Under this construction there can be no difficulty in holding that a mortgagor who sells the land conveys an estate sufficient to cause his covenants to run with the land. Accordingly it was decided in *White* vs. *Whitney*, 3 Met. 81, that the grant of an equity of redemption is so far a conveyance of land that a covenant real can be annexed to it, and will pass to the grantee's assignees. Nor do we think that even in England, which adheres more strictly to the idea that a mortgage is in fact a conveyance of the legal estate, can any case be found which can be regarded as an authority for the doctrine that a mortgagor in possession cannot *convey the land* so that his own covenants will run with the land. Sir EDWARD SUGDEN (2 Sug. on Vend. 372) regarded such a doctrine as "alarming in its consequences;" and it is the con-

stant practice in conveyancing to make vendors, who are *cestui que trusts*, mortgagors, &c., covenant for the title, with the understanding that such covenants will run with the land. 6 Bythewood's Convey. 283. And, according to *White* vs. *Whitney*, upon the construction of mortgages then adopted, a conveyance by the mortgagor will likewise transfer antecedent covenants, except so far as the mortgagee requires them to protect his rights. But in England, and in all jurisdictions which construe a mortgage as more strictly a conveyance of the legal estate, it is held that so long as the mortgage subsists, the *mortgagor* is divested of all right of action on the covenants, and, consequently, cannot transfer them to another. 4 Hare & Norwood 741; 8 East 487; 11 B. Monroe 22. Where Courts of law adopt this doctrine Courts of equity are generally ready to grant relief, and especially to protect the mortgagor against fraud. The case of *Thornton* vs. *Court*, 17 Eng. Law & Eq. 231, is an admirable illustration of this. There the decree of the Court effectually thwarted the attempted fraud; but the whole case is strong evidence of the necessity for a more certain and less circuitous remedy. Perhaps gross injustice may ordinarily be prevented by permitting the mortgagor to sue on the covenants in the name of the mortgagee; but even this may totally fail in the large class of cases where the purchaser of land mortgages it back to secure a portion of the purchase-money. Although in these cases the grantee may sue a *remote covenantor*, in the name of the mortgagee, if he *elects*, or it *becomes necessary* to sue on the immediate grantor's covenants, and this can be done only in the name of the mortgagee, the same party would be both *plaintiff* and *defendant* in the suit, which is absurd. Notwithstanding a doctrine to that effect in *Kane* vs. *Sanger*, 14 Johns. 89, it cannot be presumed that in such a case a technical objection would be suffered to avail to debar the mortgagor of his rights on the covenants. T. A. H.

[*To be continued.*]